No. 98-436

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

JOHN ALDEN, *et al.*,
Petitioners,
v.
STATE OF MAINE,
Respondent.

On Writ of Certiorari to the Supreme Judicial Court of Maine

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS' ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

The Fair Labor Standards Act of 1938 authorizes private actions for overtime compensation to be brought "in any Federal or State court of competent jurisdiction." 29 U.S.C. § 216(b). The Superior Court of Maine declined to hear such an action because it was barred by sovereign immunity. The questions presented are:

1. Whether Congress had power under the Commerce Clause of the United States Constitution to require the Superior Court of Maine to hear this action.

2. Whether the Supremacy Clause of the United States Constitution, of its own force, required the Superior Court of Maine to hear this action.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. They have a compelling interest in the issues presented in this case, which are: (1) whether Congress can use the Commerce Clause to compel state courts to adjudicate actions that the courts lack power to hear under state law; and (2) whether the Supremacy Clause, of its own force, compels a state court to hear a private, federal claim for monetary relief against its own State, without the State's consent, if the State has consented to be sued in its courts on unrelated state-law claims for monetary relief. Those issues directly implicate the States' authority "to establish the structure and jurisdiction of their own courts." *Johnson* v. *Fankell*, 521 U.S. 911, 919 (1997) (internal quotation marks and citation omitted). *Amici* therefore submit this brief to assist the Court in the resolution of this case.[1]

STATEMENT

Petitioners are current and former probation officers employed by respondent, the State of Maine. Pet. App. 1a n.1; J.A. 16, 43. They brought this action against the State in the Superior Court of Maine after an essentially identical action in federal court was dismissed on Eleventh Amendment grounds. See Pet. App. 2a.[2] Here, as in their federal-court action, petitioners sought overtime com-

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[1] Pursuant to this Court's Rule 37.2(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

pensation and liquidated damages from the State under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201 *et seq.* They asserted a cause of action under Section 216(b) of the FLSA.[3]

The Superior Court of Maine entered judgment for the State, holding that this action was barred by sovereign immunity. Pet. App. 14a-24a. The Maine Supreme Judicial Court affirmed on the same ground. *Id.* at 1a-7a.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Maine Supreme Judicial Court based the judgment below upon the state law of sovereign immunity. See Pet. App. 3a-4a. The court regarded that immunity as protected from congressional abrogation by the U.S. Constitution. See *id.* at 4a-6a. In particular, the court relied on the constitutional "postulate" (*Monaco* v. *Mississippi*, 292 U.S. 313, 322 (1934)) of which the Eleventh Amendment "is but an exemplification": namely, "[t]hat a state may not be sued without its consent." *In re New York*, 256 U.S. 490, 497 (1921). See Pet. App. 4a.

The parties dispute whether the U.S. Constitution gives States an immunity in their own courts that corresponds to

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[3] The overtime provision of the FLSA is 29 U.S.C. § 207. Section 216(b) of the FLSA, 29 U.S.C. § 216(b), provides in pertinent part:

> Any employer who violates the provisions of * * * section 207 of [Title 29] shall be liable to the employee or employees affected in the amount of * * * their unpaid overtime compensation, * * * and in an additional equal amount as liquidated damages. * * * An action to recover the liability prescribed in * * * the preceding sentence[] may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. * * *

The FLSA defines "[p]ublic agency" to include "the government of a State or political subdivision thereof; [and] any agency of * * * a State, or a political subdivision of a State." 29 U.S.C. § 203(x).

their immunity in federal court. See Brief for Petitioners (hereafter "Alden Br.") at 22-32; Brief for the United States (hereafter "U.S. Br.") at 27-36; Brief of Respondent (hereafter "Maine Br.") at 14-40. We agree with respondent that the Constitution does give States such immunity in their courts. The Court need not reach that issue, however, under our view of the case.

Insofar as the judgment below rested on an interpretation of state law, that interpretation binds this Court. See, *e.g.*, *Palmer* v. *Ohio*, 248 U.S. 32, 34 (1918). The threshold question is whether the state-law basis for the judgment is invalid under federal law. The answer is "no." Contrary to petitioners' contention, the state law is neither preempted by Section 216(b) of the FLSA nor invalidated by the Supremacy Clause of its own force.[4]

1. Section 216(b) of the FLSA did not require the Superior Court of Maine to hear this action. To the extent that Section 216(b) is construed to impose such a requirement, it exceeds Congress's power.

Early decisions of this Court recognized that Congress lacks power to compel state courts to hear actions outside their jurisdiction under state law. Those decisions reflected principles that were broadly accepted and well-established.

Later decisions of the Court held that the Supremacy Clause sometimes obligates state courts to enforce federal law. The later decisions indicated, however, that Congress cannot enlarge the enforcement obligations imposed on state courts by the Supremacy Clause. The later decisions thus confirm the early decisions.

The Court's decisions in *New York* v. *United States*, 505 U.S. 144 (1992), and *Printz* v. *United States*, 521

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[4] Because the judgment below rested on state law, it can be reversed only if the state-law basis for the judgment is invalid on one of the two federal-law grounds asserted by petitioners. Thus, even if petitioners were correct that the U.S. Constitution does not bar this action, that would not justify reversal of the judgment below.

U.S. 898 (1997), reaffirm that the Supremacy Clause is the sole source of a state court's obligation to enforce private rights created by federal statutes enacted under the Commerce Clause. Moreover, the reasoning of *New York* and *Printz* confirms that Congress cannot use the Commerce Clause to require a state court to hear a federal claim that the Supremacy Clause would not require it to hear. Such commandeering of state courts violates the principle of dual sovereignty established by the Constitution.

The violation is particularly grave when, as here, Congress compels the state courts to hear private claims for retroactive monetary relief against their own State to which the State has not consented. That form of compulsion should not be sustained even assuming that Congress can compel state courts to hear other types of claims.

2. The Supremacy Clause did not of its own force require the Superior Court of Maine to hear this action. The Supremacy Clause invalidates state laws that permit or require state courts to discriminate against federal claims. The Clause does not otherwise add to the jurisdiction of state courts. Thus, the Supremacy Clause would not invalidate a state law that barred *all* claims against the State in state court, because such a law does not discriminate against federal claims. And the Clause would not compel a state court to hear a federal claim against the State, because the court would lack power to do so under neutral state law (which includes the state law of immunity).

When a State partially waives immunity in its courts, those courts do not become obligated to hear all federal claims against the State. Rather, the Supremacy Clause requires a state court to hear a federal claim against the State only if the court has power under state law to hear a state-law claim against the State arising from the same facts as does the federal claim. This is clear from decisions of this Court concerning the effect of a State's waiver of sovereign immunity in federal court. Those decisions

establish that, by consenting to the adjudication of a claim, a State does not expose itself to factually unrelated claims.

Maine law did not empower the Superior Court of Maine to hear an action against the State based on the facts underlying petitioners' FLSA claims. The Supremacy Clause therefore did not require the Superior Court to hear those claims.

ARGUMENT

FEDERAL LAW DID NOT REQUIRE THE SUPERIOR COURT OF MAINE TO HEAR THIS ACTION

The Maine Supreme Judicial Court held that this action was barred by the state law of sovereign immunity. See Pet. App. 2a-7a. Petitioners contend that the state law is invalid because it (1) "is inconsistent with federal law"; and (2) "discriminates against claims brought under federal law." U.S. Br. 24; see Alden Br. 19 & 32-33. Specifically, petitioners argue that the state law is inconsistent with Section 216(b) of the FLSA and is therefore preempted by it. U.S. Br. 26-27; Alden Br. 19. This preemption argument, of course, rests on Section 216(b) as buttressed by the Supremacy Clause.[5] Petitioners' discrimination argument rests on the Supremacy Clause alone, as construed in the line of cases that includes *Testa* v. *Katt*, 330 U.S. 386 (1947). See U.S. Br. 21-26; Alden Br. 32-37.

Petitioners' preemption argument has independent significance only if Section 216(b) of the FLSA requires state courts to hear cases that the Supremacy Clause, standing alone, would not require them to hear. We show

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[5] U.S. Const. art. VI, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

in Part I below that Section 216(b) does not impose obligations on state courts beyond those imposed by the Supremacy Clause.

We show in Part II below that the Supremacy Clause did not of its own force require the Superior Court of Maine to hear this action. The Supremacy Clause invalidates state laws that permit or require state courts to discriminate against federal law. The judgment below does not rest on such a law.

I. THE FLSA DID NOT REQUIRE THE SUPERIOR COURT OF MAINE TO HEAR THIS ACTION, BECAUSE CONGRESS LACKS POWER TO IMPOSE SUCH A REQUIREMENT

A federal statute preempts state law only if the federal statute falls within an enumerated power of Congress. See, *e.g.*, *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991). Section 216(b) of the FLSA does not fall within Congress's power to the extent that it compelled the Superior Court of Maine to hear this action. Section 216(b), like the rest of the FLSA, rests on the Commerce Clause. See, *e.g.*, *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 537-556 (1985). Congress cannot use that Clause to compel state courts to hear actions that fall outside their jurisdiction under state law.[6]

[6] As a matter of statutory interpretation, Section 216(b) of the FLSA should not be read to have required the Superior Court of Maine to hear this action. Section 216(b) authorizes an action only in a "State court of competent jurisdiction." 29 U.S.C. § 216(b). Because this action was barred by sovereign immunity, the Superior Court of Maine was "not competent to render judgment against a nonconsenting State." *Employees of Dep't of Pub. Health & Welfare* v. *Department of Pub. Health & Welfare*, 411 U.S. 279, 284 (1973) (holding that prior version of Section 216(b) did not abrogate Eleventh Amendment immunity); see also note 22, *infra* (citing Maine case law). For reasons discussed in this brief, Section 216(b) raises serious constitutional issues, at least, if it is construed to compel the Superior Court to hear this action. The statute therefore should not be so construed. *See, e.g., Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 463 U.S. 147, 157 (1983). Furthermore, Section 216(b) serves a useful function if it is read only to permit state courts to hear FLSA actions when they have jurisdiction to do so under state law. So read, it avoids uncertainty about whether a private cause of action under the FLSA is enforceable exclusively in federal court. Cf., *e.g.*, *Yellow Freight Sys., Inc.* v. *Donnelly*, 494 U.S. 820, 822 & n.2 (1990).

A. Early Decisions of This Court Recognize That Congress Cannot Compel State Courts to Adjudicate Cases That Fall Outside Their Jurisdiction Under State Law

This Court recognized early on that Congress lacks power under the original Constitution to compel state courts to hear cases outside their jurisdiction under state law. The Court expressed that recognition in two ways. First, the Court said that, even when state courts adjudicate federal claims, they are exercising power derived from state law.[7] More to the point, the Court said that Congress cannot confer jurisdiction on state courts.[8] Those

[7] See, *e.g.*, *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 337 (1816) (stating that state courts have concurrent jurisdiction over Art. III cases "only * * * in those cases where, previous to the constitution, state tribunals possessed jurisdiction independent of national authority"); *Claflin* v. *Houseman*, 93 U.S. (3 Otto) 130, 137 (1876) (holding that state courts could entertain actions authorized by federal law even though "a State court derives its existence and functions from the State laws"); see also *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 97 (1807) (Marshall, C.J.) (state courts "emanate from a different authority, and are creatures of a distinct government").

[8] See, *e.g.*, *Claflin*, 93 U.S. at 141 (denying "that Congress could confer jurisdiction upon the State courts"); *Houston* v. *Moore*, 18 U.S. (5 Wheat.) 1, 27-28 (1820) (opinion of Washington, J.) ("I hold it to be perfectly clear, that Congress cannot confer jurisdiction upon any Courts, but such as exist under the constitution and laws of the United States, although the State Courts may exercise jurisdiction on cases authorized by the laws of the State, and not prohibited by the exclusive jurisdiction of the federal Courts."); *id.* at 67 (Story, J., dissenting) ("There is no pretence to say, that Congress can compel a State Court Martial to convene

statements deny Congress the power asserted here—*i.e.*, to compel a state court to hear a private action that the court lacks power to hear under state law.[9]

The statements in the Court's early decisions reflected principles that were already well-established by then. Alexander Hamilton concluded in Federalist No. 82 that state courts would use their preexisting power under state law to hear cases arising under federal statutes.[10] That conclusion led to the broadly accepted view that Congress

and sit in judgment on [a federal criminal] offence."); see also *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738, 821 (1824) (asserting that state tribunals "may be closed to any claim asserted under a law of the United States"); *Stearns* v. *United States*, 22 F. Cas. 1188, 1192 (C.C. D. Vt.) (Thompson, Circuit Justice) ("Congress cannot compel a state court to entertain jurisdiction in any case * * *."); *Mitchell* v. *Great Works Milling & Mfg. Co.*, 17 F. Cas. 496, 499 (C.C. D. Me. 1843) (Story, Circuit Justice) ("It is clear, that congress has no right to require, that the state courts shall entertain [bankruptcy] suits * * *.").

[9] These statements are not dispositive, since this Court has not squarely addressed the questions presented here. See Richard H. Seamon, *The Sovereign Immunity of States in Their Own Courts*, 1 Brandeis L.J. —— (forthcoming Apr. 1999) at n.4 (citing extensive commentary recognizing unresolved nature of state courts' obligation to hear private federal claims), draft available at http://www.law.sc.edu/seamon.htm.

[10] The Federalist No. 82 addressed "the situation of the State courts in regard to those causes which are to be submitted to federal jurisdiction." The Federalist No. 82, at 458 (Alexander Hamilton) (Isaac Kramnick ed., 1987). At the outset, Hamilton established the general "rule" that "the State courts will *retain* the jurisdiction they now have." *Id.* at 459. He then asserted that this "primitive" jurisdiction would extend even to most cases arising under federal law. *Ibid.* Specifically, he believed that, "in every case in which [the state courts] were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth." *Ibid.* Hamilton emphasized that, in taking cognizance of cases arising under federal statutes, the state courts would be exercising "the judiciary power" of their own government, not that of the national government. *Ibid.*

could not compel state courts to hear cases outside their jurisdiction under state law.[11] Both principles reflected an "undoubted truth": "that there is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit." *Missouri* v. *Lewis*, 101 U.S. 22, 31 (1879).[12]

To be sure, this Court has described some early federal statutes as "conferr[ing] jurisdiction upon the state courts." *Testa* v. *Katt*, 330 U.S. 386, 389-390 (1947). Those statutes "conferred jurisdiction" only in the sense that they gave state courts enforcement authority that could have been given exclusively to federal courts. See *Claflin*, 93 U.S. at 139-140. The early statutes did not, however,

[11] See *Claflin*, 93 U.S. at 138 (citing Federalist No. 82); *Houston* v. *Moore*, 18 U.S. at 26 n.a (opinion of Washington, J.) (same); 1 Annals Cong. 808 (Joseph Gales ed. 1789) (statement of Rep. Fisher Ames) ("The law of the United States is a rule to them [*i.e.*, the state courts], but no authority for them. It controlled their decisions, but could not enlarge their powers."), quoted in Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 Wis. L. Rev. 39, 152; Alexander Hamilton, *The Examination No. 6*, N.Y. Eve. Post, Jan. 2, 1802 (describing as "liable to question" and "seriously questioned" the "right to employ the agency of the State Courts for executing the law of the Union"), reprinted in 25 The Papers of Alexander Hamilton 484 (Harold C. Syrett ed., 1977), quoted in Collins, *supra*, 1995 Wis. L. Rev. at 137 n.283; 1 James Kent, *Commentaries on American Law* 377 (New York, O. Halstead 1826) ("The doctrine seems to be admitted, that congress cannot compel a state court to entertain jurisdiction in any case.") (footnote omitted); 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1749, at 562 (3d ed. 1858). See generally James D. Barnett, *The Delegation of Federal Jurisdiction to State Courts*, in 3 *Selected Essays on Constitutional Law: The Nation & the States* 1202, 1213 (Ass'n Am. Law Sch. ed. 1938), cited in *Testa* v. *Katt*, 330 U.S. 386, 390 n.5 (1947).

[12] Cf. *Minneapolis & St. Louis R.R. Co.* v. *Bombolis*, 241 U.S. 211, 221 (1916) (argument that state court should be regarded as federal court when adjudicating federal claim was "in conflict with an essential principle upon which our dual constitutional system of government rests").

unambiguously compel state courts to enforce federal law if they lacked power to do so under state law. See *Printz* v. *United States*, 521 U.S. 898, 906 n.1 (1997).[13] To the extent that the statutes could be construed to exert such compulsion, their constitutionality was consistently disputed.[14]

Moreover, none of the early federal statutes compelled state courts to hear actions against their own State. Neither those statutes—nor anything else in this country's history, for that matter—supports the congressional power that petitioners defend here.[15]

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[13] See also *Holmgren* v. *United States*, 217 U.S. 509, 517 (1910) (state courts can enforce federal law "[u]nless prohibited by state legislation"); *United States* v. *Jones*, 109 U.S. 513, 520 (1883) ("And though the jurisdiction thus conferred [by early federal statutes] could not be enforced against the consent of the States, yet, when its exercise was not incompatible with State duties, and the States made no objection to it, the decisions rendered by the State tribunals were upheld.").

[14] See, *e.g.*, Collins, note 11 *supra*, 1995 Wis. L. Rev. at 135-164; William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 Stan. L. Rev. 1033, 1094 n.237 (1983); Charles Warren, *Federal Criminal Laws & the State Courts*, 38 Harv. L. Rev. 545, 546 (1925) (asserting, in article discussing early federal statutes apparently requiring state-court enforcement, that "Congress has no power to *force* jurisdiction upon a State Court").

[15] See Fletcher, note 14 *supra*, 35 Stan. L. Rev. at 1095 (finding it "clear" that the framers of the Eleventh Amendment "did not contemplate" that "Congress could require state courts to hear cases barred from federal courts by the Eleventh Amendment"); James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 Cal. L. Rev. 555, 596 (1994) ("It seems unlikely * * * that the framers [of the original Constitution] would have chosen to compel the state courts to entertain federal claims against their will and in violation of their own jurisdictional limits.") (footnote omitted).

B. This Court Confirmed Its Early Decisions In Later Decisions Holding That the Supremacy Clause Sometimes Compels State Courts to Adjudicate Federal Actions

In this century, the Court has held that the Supremacy Clause sometimes obligates state courts to enforce federal law. The Court has linked that obligation to the state courts' having jurisdiction to do so under neutral state law. At the same time, the Court has strongly suggested that Congress cannot enlarge the jurisdiction of state courts beyond that established by neutral state law.

In *Mondou* v. *New York, New Haven & Hartford R.R. Co.*, the Court held that a state court erred in refusing to enforce a federal statute because of disagreement with the policy underlying the statute. 223 U.S. 1, 55-59 (1912). The Court concluded that rights arising under federal law are enforceable in state courts "when their jurisdiction, as prescribed by local laws, is adequate to the occasion." *Id.* at 59. Thus, the state courts' duty to enforce federal rights depends on "[t]he existence of the jurisdiction." *Id.* at 58. The Court in *Mondou* emphasized that the case did not involve "any attempt by Congress to enlarge or regulate the jurisdiction of state courts." *Id.* at 56.[16]

The Court took similar care in *Testa* to avoid implying that Congress could enlarge the jurisdiction of state courts. *Testa* held that a state court could not decline enforcement of a federal law because the law was "foreign in the international sense." See 330 U.S. at 388 (internal quota-

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[16] See also *Herb* v. *Pitcairn*, 324 U.S. 117, 120 (1945) (quoting this passage from *Mondou*); *Bombolis*, 241 U.S. at 219 ("proceedings in state courts [under the federal statute at issue] deriv[e] their authority from state law"); *id.* at 222 (*Mondou* "in no sense implied that the duty which was declared to exist on the part of the state court depended upon the conception that for the purpose of enforcing that [federal] right, the state court was to be treated as a Federal court, deriving its authority not from the State creating it, but from the United States").

tion marks & citation omitted). The Court in *Testa* further held that the state court had an obligation to enforce the federal law. *Id.* at 390-394. The Court traced that obligation directly to the Supremacy Clause. *Id.* at 389. As in *Mondou*, however, the Court premised that obligation on the state court's having "jurisdiction adequate and appropriate under established local law." *Id.* at 394.

Thus, the Court in *Mondou* and *Testa* held that the Supremacy Clause invalidated state laws that permitted or required state courts to discriminate against federal claims. The Court premised the state courts' duty to hear those claims, however, on their having power to do so under the state law that remained intact once the discriminatory state law was set aside. At the same time, the Court deliberately avoided suggesting that Congress could compel state courts to hear federal claims that they would not have power to hear under neutral state law. The Court thereby strongly implied that Congress lacked the power to do so. That implication accorded with direct statements to the same effect in earlier decisions (see Part I.A, *supra*).

C. *New York* and *Printz* Establish Congress's Lack of Power Under the Commerce Clause to Commandeer the State Courts

This Court reaffirmed in *New York* v. *United States* and *Printz* v. *United States* that the Supremacy Clause is the source of the state courts' obligation to enforce Article I statutes. See *Printz*, 521 U.S. at 928-929; *New York* v. *United States*, 505 U.S. 144, 178-179 (1992). In addition, those cases confirm that Congress cannot enlarge the state courts' obligation using the Commerce Clause. The pertinence of *New York* and *Printz* becomes clear when one considers petitioners' view of Congress's power. The congressional commandeering of state courts permitted under that view would harm the system of dual sovereignty in the same ways that led this Court in *New York* and *Printz* to strike down federal statutes that commandeered the other branches of state government.

In the absence of a valid exercise of congressional power, States have broad control over their courts. In particular, the state courts can decline to hear a federal action if they have a valid excuse for doing so. See, *e.g.*, *Howlett* v. *Rose*, 496 U.S. 356, 369 (1990). An excuse is valid if it relates to judicial administration and neither discriminates against nor is inconsistent with federal law. See *id.* at 371-372. Thus, in the absence of a valid federal statute, a State may neutrally control the volume and types of cases that its courts can hear. See *Missouri ex rel. Southern Ry. Co.* v. *Mayfield*, 340 U.S. 1, 4 (1950); *Douglas* v. *New York, New Haven & Hartford R.R. Co.*, 279 U.S. 377, 387-388 (1929).

Petitioners contend that Congress can eliminate the States' control over their courts. They assert that a state court must "enforce a federal law when[ever] federal law requires it to do so." U.S. Br. 22; see Alden Br. 19. They also assert that Congress has unlimited power to impose such requirements under the Commerce Clause. See U.S. Br. 26-27; Alden Br. 21-22.[17] In petitioners' view, therefore, Congress can compel state courts to enforce Commerce Clause enactments even if the courts lack power to do so under neutral state law.[18]

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[17] Petitioners rely heavily on *Howlett* v. *Rose*, 496 U.S. 356, in which a state-law limitation on state-court jurisdiction was asserted to be inconsistent with a federal statute, 42 U.S.C. § 1983, enacted under Section 5 of the Fourteenth Amendment. See U.S. Br. 21-22; Alden Br. 14, 16-22; cf. *Mitchum* v. *Foster*, 407 U.S. 225, 238 (1972). It is doubtful that Congress's power to compel state-court adjudication under that provision corresponds to its power to do so under the Commerce Clause. See *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 65-66 (1996).

[18] Petitioners suggest that Congress's power extends only to "state courts of general jurisdiction." Alden Br. 7; cf. U.S. Br. 20. The logic of petitioners' argument admits of no such limitation. Petitioners evidently make the suggestion to avoid the implication

Petitioners' view cannot be reconciled with *New York* and *Printz*. Those decisions identify three harms to the system of dual sovereignty caused by congressional "commandeering" of state government. Each harm could occur if Congress could commandeer the state courts by requiring them to adjudicate federal claims despite the limits on those courts' jurisdiction established by neutral state law.

First, congressional commandeering of state courts would divert state time and resources from matters of local concern. See *FERC* v. *Mississippi*, 456 U.S. 742, 763 n.27 (1982); cf. *Printz*, 521 U.S. at 930; *New York*, 505 U.S. at 168. Simply put, the more time and money that Congress required state courts to devote to hearing federal cases, the less they would have for hearing state cases. Congressional commandeering of the state courts could consume just as much state energy as could congressional commandeering of the other branches of state government.

Second, congressional commandeering of state courts would interfere with the power of the State's citizens to set an agenda for state legislative action. See *FERC*, 456 U.S. at 763 n.27; cf. *id.* at 779 & 784-785 (O'Connor, J., concurring in the judgment in part and dissenting in part); *New York*, 505 U.S at 168-169, 173-174 & 185. A state legislature often responds to local problems by enacting laws that must be enforced in state courts. The legislature cannot effectively respond in that way when the state courts are already clogged. Moreover, in that situation the legislature cannot expedite the adjudication of urgent cases in the state courts.

Finally, congressional commandeering of state courts would blur the lines of accountability between state and federal officials. Cf. *Printz*, 521 U.S. at 930; *United States* v. *Lopez*, 514 U.S. 549, 581-582 (1995) (Kennedy, J., concurring); *New York*, 505 U.S. at 169. A state legislature could react in two ways to the congressional commandeering of its courts. It could expand its court system, but that would take money. It could do nothing, but that would cause the quality and speed of state-court adjudication to deteriorate. Either route would cause state residents to blame members of the state legislature, rather than members of Congress, for the increase in costs or the decrease in efficiency.

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that Congress could compel even state courts of limited jurisdiction, such as small-claims courts, to adjudicate federal actions without regard to state-law limits on their jurisdiction. Cf. *Herb*, 324 U.S. at 120-124.

New York and *Printz* make clear that Congress could not compel a state legislature to enact, and the Governor to sign, a law requiring state courts to hear federal claims. The reasoning of *New York* and *Printz* makes clear that Congress cannot achieve the same result by enacting an identical statute itself. See also *Holmgren*, 217 U.S. at 517 ("It is undoubtedly true that the right to create courts for the states does not exist in Congress.").

D. Congress Severely Undermines the Federalist System of Dual Sovereignty When It Compels State Courts to Hear Private Claims for Retroactive Monetary Relief Against Their Own, Unconsenting State

This case involves a use of the Commerce Clause that deeply harms the federalist system of dual sovereignty. Here, Congress seeks to compel a state court to hear an action for retroactive monetary relief against its own State without its consent. That use of the Commerce Clause should be rejected even if Congress can compel state courts to adjudicate other types of federal actions.

Congress is using the Commerce Clause in this case to turn the State against itself. The case pits the executive branch of Maine against its judicial branch. The executive branch has scrupulously honored its obligations under the FLSA, as that branch understands them. Petitioners argue that Section 216(b) of the FLSA compels the state judiciary to review the executive branch's understanding. If the state court's understanding differs from

that of the coequal branch, it may enter an award payable out of the state treasury. That would pit the judiciary against the third branch, the legislature, which has exclusive control over the treasury. See Me. Const. art. V, pt. 3d, § 4.

Congress cannot do this. Decisions by the people of a State allocating powers among the branches of their state government "go to the heart of representative government." *Gregory*, 501 U.S. at 461 (internal quotation marks and citation omitted); see *id.* at 460 ("Through the structure of its government * * *, a State defines itself as a sovereign."); see also *Highland Farms Dairy, Inc.* v. *Agnew*, 300 U.S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."). That is especially true of decisions about control of the state treasury. See *Louisiana* v. *Jumel*, 107 U.S. 711, 727-28 (1883). Thus, Congress cannot use the Commerce Clause to empower the federal courts to tap the state treasury. See *Seminole Tribe*, 517 U.S. at 63-73. Congress should not be able to use that Clause to compel state courts to tap the state treasury.

Indeed, such a use of the Commerce Clause conflicts with *New York*. The Court there held that Congress could not compel a State that missed a federal deadline to grant a subsidy to private parties. See *New York*, 505 U.S. at 175. Similarly, Congress cannot compel a State that allegedly violated a federal payscale to make a payment from the state treasury to private parties. That conclusion is not altered by the fact that, here, Congress seeks to exert that compulsion through the state courts. That simply compounds the harm to dual sovereignty, given the state courts' lack of power to grant such payments.[19]

[19] Although Congress cannot compel the state courts to award retroactive monetary relief against their own State, the States must comply with the substantive provisions of the FLSA, and other remedies are available for noncompliance. See Maine Br. 11-13.

II. THE SUPREMACY CLAUSE DID NOT OF ITS OWN FORCE REQUIRE THE MAINE SUPERIOR COURT TO HEAR THIS ACTION

A. The Supremacy Clause Would Not Require a State Court to Hear an FLSA Claim If State Law Barred All Private Actions Against the State in Its Own Courts

The Supremacy Clause, of its own force, invalidates state laws that discriminate against federal claims. See, *e.g.*, *McKnett* v. *St. Louis & San Francisco Ry. Co.*, 292 U.S. 230, 234 (1934). The Clause also requires state courts to hear federal claims that, apart from such discriminatory state laws, they are "otherwise" competent under state law to hear. *Howlett*, 496 U.S. at 374. Besides invalidating discriminatory state-law restrictions on the power of state courts, however, the Supremacy Clause does not enlarge the jurisdiction of state courts.

Thus, a state court may, consistently with the Supremacy Clause, decline to hear federal actions on the basis of a "neutral state rule regarding the administration of the courts." *Howlett*, 496 U.S. at 372.[20] A state law that barred *all* claims against the State in its courts would constitute such a rule. See Laurence H. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 Harv. L. Rev. 682, 692 n.62 (1976). Thus, the Supremacy Clause would not require a state court to entertain an FLSA action against the State if the State completely retained immunity in its courts.

Petitioners concede as much. The federal petitioner says: "When a state court's basis for refusing to entertain a federal monetary claim is a sovereign immunity

[20] Those rules may be preempted by a valid federal law. *Howlett*, 496 U.S. at 372; see, *e.g.*, *Felder* v. *Casey*, 487 U.S. 131, 138-153 (1988). We showed in Part I, however, that no preemption occurred here.

defense, the relevant question—for the specific purpose of assessing the issue of discrimination—is whether the state court entertains state-law monetary claims against the State in which the State does not recognize sovereign immunity as a defense." U.S. Br. 25. The inescapable implication is that, if the answer to the "relevant question" is no—*i.e.*, if the state court does not entertain *any* state-law, monetary claim against the State—then the State's assertion of the sovereign immunity defense to a federal monetary claim does not violate the Supremacy Clause's nondiscrimination principle. The same implication flows from the private petitioners' argument on the discrimination issue. See Alden Br. 32-37.

It thus appears to be common ground that the judgment below would have to be affirmed if Maine had wholly preserved its immunity from suit in its courts. In that event, the Supremacy Clause would not invalidate the state law of immunity. That law would remain intact and prevent state courts from being competent to hear any claims against the State, including federal claims based on Commerce Clause enactments.

B. The Supremacy Clause Does Not Require a State Court to Hear a Federal Claim Unless State Law Would Empower the Court to Hear A State-Law Claim Arising From the Same Facts

Maine has not wholly retained immunity in its courts; it has consented to suits on certain private claims. See Pet. App. 6a. That consent did not trigger a Supremacy Clause obligation by its courts to hear actions for overtime compensation under the FLSA. The Supremacy Clause only obligates a state court to apply federal law to a dispute that the court has power to hear under state law. The Clause therefore does not require a state court to hear a federal claim if the court lacks power to decide a state-law claim arising from the same facts.

This is clear from this Court's precedent in an analogous setting. The precedent concerns actions in federal court

to which the State has consented. The precedent establishes that a State cannot restrict its consent so as to prevent a federal court from applying relevant federal law. Such a restriction would require the federal court to violate the Supremacy Clause. The precedent also establishes, however, that a State's consent cannot be enlarged beyond that necessary for a federal court to comply with the Supremacy Clause.

The leading case is *Gardner* v. *New Jersey*, 329 U.S. 565 (1947). See also *Wisconsin Dep't of Corrections* v. *Schacht*, 118 S. Ct. 2047, 2056 (1998) (Kennedy, J., concurring) (citing *Gardner* with approval). In *Gardner*, the State filed a claim against the bankruptcy estate in a federal reorganization proceeding. See *id.* at 570. The State argued that the Eleventh Amendment barred the federal court from considering objections to the State's claim. See *id.* at 571. This Court rejected that argument. *Id.* at 573-575. The Court held that, "[w]hen the State becomes the actor and files a claim * * * it waives any immunity which it otherwise might have had respecting the adjudication of the claim." *Id.* at 574.[21]

The Court has made clear, however, that a sovereign's waiver does not extend beyond matters "respecting the adjudication of the [sovereign's] claim." *Id.* The defendant to the claim "may, without statutory authority, recoup on a counterclaim an amount equal to the principal claim." *United States* v. *United States Fidelity & Guar. Co.*, 309 U.S. 506, 511 (1940); see also 3 *Moore's Federal Practice* § 13.50[4], at 13-69 (3d ed. 1998). The

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[21] A State's voluntary submission of an affirmative claim to a federal court differs greatly from conduct that the Court has held insufficient to constitute a waiver of sovereign immunity. See *Schacht*, 118 S. Ct. at 2056-2057 (Kennedy, J., concurring); see also, *e.g.*, *Edelman* v. *Jordan*, 415 U.S. 651, 673 (1974). *Gardner* therefore does not support a doctrine of "constructive waiver," and other precedent of this Court has cast serious doubt on, if not invalidated, that doctrine, see *Chavez* v. *Arte Publico Press*, 157 F.3d 282, 285-287 (5th Cir. 1998), *reh'g en banc granted* (Oct. 1, 1998).

defendant can assert such a counterclaim, however, only to reduce or eliminate affirmative recovery by the sovereign. See, *e.g.*, *Livera* v *First Nat'l State Bank*, 879 F.2d 1186, 1195 (3d Cir.), *cert. denied*, 493 U.S. 937 (1989). Furthermore, the defendant's counterclaim must arise out of the same facts as the sovereign's claim. See, *e.g.*, *ibid.*; accord, *e.g.*, *In re Creative Goldsmiths of Washington, D.C., Inc.*, 119 F.3d 1140, 1148-1150 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1517 (1998); *Commonwealth* v. *Matlack*, 4 U.S. (4 Dall.) 303 (Pa. 1804).

The recoupment doctrine honors a sovereign's immunity while ensuring that federal courts honor the Supremacy Clause. A State may waive its immunity by submitting a claim to a federal court. The State cannot, however, limit that waiver so as to prevent the court from following federal law applicable to the claim. Such a limitation would require the court to violate the Supremacy Clause by disregarding federal law. No such violation occurs, however, when a federal court declines to hear counterclaims against the State that do not arise out of the same facts as does the State's claim. The court's refusal to hear such counterclaims respects sovereign immunity to the extent permitted by the Supremacy Clause.

The same reasoning applies when a State waives its immunity, not by filing a claim in federal court, but by consenting to claims against it in its own courts. The State cannot limit its consent so as to prevent its courts from applying relevant federal law in resolving the claims. The State can, however, refuse to consent to claims that do not arise out of the same facts as do the claims to which it has consented. The State's withholding of such consent does not require the state courts to violate the Supremacy Clause.

Suppose, for example, that a State authorized a discharged employee to sue it on the ground that her discharge violated the employment contract. The State could not prevent the employee from arguing that her discharge

also violated a valid federal statute. That restriction would require the state court to disregard federal law governing the dispute over the discharge. Such disregard would violate the Supremacy Clause.

No similar violation would occur if the State consented to suits for wrongful discharge but not to suits for unrelated claims arising during the term of employment. The Supremacy Clause is offended only when the State allows its courts to hear a state-law claim, but prohibits them from hearing a federal claim arising from the same facts. It is only in that situation that the State's restriction on its consent to suit would require the courts to violate the Supremacy Clause.

C. The Supremacy Clause Did Not Require the Superior Court of Maine to Hear Petitioners' FLSA Claims, Because State Law Did Not Empower the Court to Hear a State-Law Claim Arising From the Same Facts As Do Petitioners' Claims

Although Maine has waived immunity from certain actions in its courts, it has not waived its immunity from actions for overtime. See Pet. App. 6a. Maine has done more than simply refrain from creating a cause of action for overtime from the State. See Me. Rev. Stat. Ann. tit. 26, § 664.3.D. It has barred its courts from entertaining such actions whether they arise under federal or state law.[22] Because Maine did not empower the Superior Court of Maine to hear a state-law claim arising from the facts underlying petitioners' claims, that court was not obligated to hear those claims by the Supremacy Clause.

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[22] See, *e.g.*, *Davies* v. *City of Bath*, 364 A.2d 1269, 1270 (Me. 1976) (state courts lack power to impose monetary liability in action barred by sovereign immunity); *Bale* v. *Ryder*, 286 A.2d 344, 348 (Me. 1972) (same); see also *Drake* v. *Smith*, 390 A.2d 541, 544 (Me. 1978) (court lacked power to issue declaratory relief that would serve no purpose other than to establish liability of immune entity).

The private petitioners contend that the state court did have such an obligation because it entertains state-law claims that are "analogous" to petitioners' claims. Alden Br. 32; see also U.S. Br. 25. That contention rests on an unworkable standard. At a high enough level of generality, every claim is analogous to every other one, and the private petitioners offer no guidance for determining the appropriate level of generality.

The federal petitioner does propose a standard: It argues that all private, monetary claims against a State should be regarded as analogous. U.S. Br. 20, 25. In its view, therefore, if a State waives its immunity from any private monetary claims, it exposes itself to all federal monetary claims. The federal petitioner offers no legal support for that standard. In any event, it should be rejected, for it would give States a strong incentive not to waive their immunity at all.

More fundamentally, both petitioners' theories conflict with this Court's precedent. The precedent establishes that the Supremacy Clause does not add to the jurisdiction of state courts except by invalidating discriminatory restrictions on their jurisdiction. See Part II.A, *supra*. Thus, for example, the Clause does not compel a state court to hear a federal claim that is barred by the state law doctrine of *forum non conveniens* or that falls outside the court's territorial jurisdiction, regardless of how closely analogous the claim might be to claims that fall within the state court's jurisdiction. See *Mayfield*, 340 U.S. at 4; *Herb*, 324 U.S. at 120-124; cf. *McKnett*, 292 U.S. at 231-234. However analogous a federal claim might be to a state-law claim that falls within a state court's jurisdiction, the Supremacy Clause does not require the state court to hear the federal claim if the court lacks power to do so under neutral state law, including the law of sovereign immunity.[23]

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[23] This conclusion is supported by *Georgia R.R. & Banking Co.* v. *Musgrove*, 335 U.S. 900 (1949) (per curiam), cited in *Howlett*, 496 U.S. at 372. In *Musgrove*, this Court dismissed an appeal from a judgment of the Georgia Supreme Court, holding that that judgment was "based upon a non-federal ground adequate to support it." 335 U.S. at 900. The judgment below had relied on the state law of sovereign immunity to affirm the dismissal of a state-court action against a state official alleging a violation of the U.S. Constitution. See *Musgrove* v. *Georgia R.R. & Banking Co.*, 204 Ga. 139, 156-160 (1948), *appeal dismissed*, 335 U.S. 900 (1949). This Court's holding in *Musgrove* establishes that federal law does not require a state court to hear a federal claim that would have been barred by the Eleventh Amendment had the claim been brought in federal court. As such, *Musgrove* accords with other precedent of this Court. See generally Seamon, *supra* note 9.

Petitioners' contrary position finds no support in *Testa*. The Court in *Testa* observed that Rhode Island courts heard state claims of the "same type" as the federal claim at issue. 330 U.S. at 394; see also *Howlett*, 496 U.S. at 375. The Court made that observation, however, to show that the state courts had "jurisdiction * * * under established local law to adjudicate" the *federal* claim. *Testa*, 330 U.S. at 394; see also *Howlett*, 496 U.S. at 378-379.[24] Nothing in *Testa* suggests that a state court must entertain a federal claim that is merely analogous to claims over which the court has jurisdiction under state law, even though the federal claim falls outside the court's jurisdiction as established by neutral state law.

Such a suggestion, moreover, would have dramatically departed from precedent. See Part I.A & I.B, *supra*. Yet the unanimous decision in *Testa* does not signal any intention to do so. To the contrary, "the sense of the *Testa* opinion was that it merely reflected longstanding

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[24] The "local law" cited in *Testa* (330 U.S. at 394 n.13): (1) gave the state district courts jurisdiction over "all civil actions * * * wherein the debt or damages * * * do not exceed $1,000.00" (R.I. Gen. Laws, ch. 500, § 28 (1938)); (2) gave the state superior court jurisdiction to review the district court's decisions in such cases (*id.*, ch. 525, § 7); and (3) divided between those two courts jurisdiction over actions to recover "fines, penalties, and forfeitures" (*id.*, ch. 631, § 4).

constitutional decision and policy." *Palmore* v. *United States*, 411 U.S. 389, 402 (1973).

* * * *

Neither the FLSA, as buttressed by the Supremacy Clause, nor the Supremacy Clause, of its own force, compelled the Superior Court of Maine to hear this action.

CONCLUSION

The judgment of the Maine Supreme Judicial Court should be affirmed.

Respectfully submitted,

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